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1 [The R.M.C. 803 session was called to order at
2 1002, 26 February 2020.]

3 MJ [COL WATKINS]: The commission is called to order. All
4 parties present when the commission recessed on 25
5 February 2020 are again present. The accused is present.

6 I intend to hear oral argument today on Appellate
7 Exhibit 040. I'll note for counsel that I've read all the
8 pleadings.

9 Defense, you bear the burden. Do you wish to be
10 further heard?

11 CDC [MR. DIXON]: Yes, Your Honor.

12 MJ [COL WATKINS]: You may proceed.

13 CDC [MR. DIXON]: Thank you, Your Honor.

14 DDC [MR. MOSS]: Good morning, Your Honor.

15 MJ [COL WATKINS]: Good morning.

16 DDC [MR. MOSS]: May it please the commission, I'm Ian
17 Moss on behalf of the accused, Mr. Khan.

18 I want to begin by making clear to the commission that
19 the issue of Mr. Reismeier's disqualification as convening
20 authority is not one that the defense sought out. It is not a
21 defense tactic or scorched-earth litigation. This issue arose
22 through no fault of Mr. Khan or his counsel, and, accordingly,
23 we have an ethical obligation to confront this issue fully.

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1 If we were not to deal with this issue or were to
2 accept at face value the prosecution's assertions, assertions
3 I'll add which are undermined by information contained in the
4 raft of belatedly disclosed discovery, then any additional
5 future adverse action taken against Mr. Khan by Mr. Reismeier
6 would occur under a dark cloud as to whether Mr. Reismeier's
7 actions are the result of his myriad and clear conflicts and
8 his inelastic attitude, thus resulting in unfairness to
9 Mr. Khan and undermining public confidence in these
10 proceedings.

11 Your Honor, it is abundantly clear that
12 Mr. Reismeier's litany of conflicts render him unable to meet
13 his obligations to impartially execute the responsibilities of
14 the convening authority for this commission.

15 Given the unique circumstances of this case,
16 Mr. Khan's status as the sole cooperating high-value detainee;
17 that he has entered a guilty plea and is committed to -- to
18 continuing to provide substantial cooperation to the
19 government, as he has done for the past eight years; and given
20 the unique role that the convening authority serves in the
21 military commission, that as a quasi-judicial actor, as
22 Mr. Reismeier conceded yesterday, it is absolutely critical
23 that there not even be the appearance of partiality on the

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1 part of the convening authority, let alone actual conflict as
2 we have here and as is made clear by the 1,000 pages of
3 belatedly and incomplete discovery that was reluctantly
4 disclosed by the prosecution.

5 Your Honor, as we argued in our motion to disqualify
6 the convening authority, there are three independent bases to
7 disqualify Mr. Reismeier from serving as convening authority
8 in this commission:

9 First, under R.M.C. 504, Mr. Reismeier is a type-three
10 accuser.

11 Second, Mr. Reismeier has an inelastic attitude toward
12 issues central to this case.

13 And third, Mr. Reismeier's continued service as
14 Convening Authority in this case, with his years of close
15 contact and deliberate alignment with the litigant in this
16 case, the Office of the Chief Prosecutor, unnecessarily casts
17 a dark cloud over these proceedings due to an appearance of
18 conflict.

19 Mr. Reismeier is a type-three accuser under
20 R.M.C. 504. While it is true that Mr. Reismeier was not
21 involved in any charging decisions in this specific
22 commission, he does, however, have a clear personal interest
23 in the prosecution of Mr. Khan and the outcome of this

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1 commission.

2 As we discussed in detail in our pleadings, we
3 respectfully submit that Mr. Reismeier is a type-three accuser
4 for two interrelated reasons:

5 First, as he testified yesterday, and of which he has
6 so proudly boasted publicly in his private practice biography,
7 Mr. Reismeier wrote the very statute that authorizes this
8 commission and the rules and regulations under which it
9 operates. Indeed, Mr. Reismeier has not been modest about his
10 integral role in the authorship of the Military Commissions
11 Act and associated rules and regulations.

12 In an e-mail correspondence with a chief counsel of a
13 nonprofit organizations whose amicus brief he signed in
14 support of the government's position against a detainee who,
15 like Mr. Khan, is charged with conspiracy, Mr. Reismeier in
16 referencing his authorship of the MCA stated, quote, I can
17 tell you that, as someone who drafted the initial 2009 MCA,
18 what I intended was to provide the broadest grant of authority
19 permissible. That quote, Your Honor, can be found at AE 037F,
20 Attachment B, Tab 3, Bates 0013.

21 This leads me to the second of the two interrelated
22 reasons why Mr. Reismeier is a type-three accuser under
23 R.M.C. 504. As is apparent from the documents initially

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1 produced by the prosecution, but made unmistakably clear from
2 the belatedly produced yet still incomplete discovery,
3 Mr. Reismeier has firmly aligned himself with the Office of
4 the Chief Prosecutor and against detainees.

5 Indeed, after his retirement from the Navy, as a
6 private citizen, Mr. Reismeier remained heavily invested in
7 the success of the government's prosecution of detainees.
8 Before signing onto an amicus brief in support of the position
9 advocated by the government against a detainee, Mr. Reismeier
10 first sought the blessing to do so from the current Chief
11 Prosecutor. He said that he did not want to sign onto
12 anything that would, quote, be counterproductive for the
13 government, end quote.

14 While during his testimony yesterday Mr. Reismeier
15 offered a creative reinterpretation of that e-mail exchange
16 with the Chief Prosecutor, that e-mail, as written in 2015,
17 speaks for itself. It was clear, Mr. Reismeier gave the
18 current Chief Prosecutor a veto over whether he signed the
19 amicus brief.

20 It's worth noting, Your Honor, that the issue in that
21 case, United States v. al Bahlul, by the way, a case that's
22 still pending before the D.C. Circuit, the issue in that case
23 is whether the charge of conspiracy is a violation triable in

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1 these military commissions. It also happens to be an offense
2 with which Mr. Khan is charged. This means, Your Honor, that
3 Mr. Reismeier is effectively a litigant against a detainee.
4 It also means he's -- that he is currently taking a position,
5 currently, in the D.C. Circuit Court of Appeals on a legal
6 matter directly impacting Mr. Khan.

7 Mr. Reismeier testified yesterday, Your Honor, that he
8 stands by the positions taken in that amicus brief, positions
9 he took, again, as a private citizen; in other words,
10 positions he took out of a personal interest. Consequently,
11 Mr. Reismeier has a personal interest in seeing that the
12 D.C. Circuit agrees with the legal position he has taken, lest
13 his ego take a hit by being told by the Circuit that his
14 position is incorrect and that the fruits of his labor, the
15 MCA which he drafted, is defective.

16 Mr. Reismeier's ego has already taken a blow once by
17 the D.C. Circuit when it invalidated the charge of material
18 support as triable in the military commissions, thus
19 invalidating part of his professional legacy. I'll note as a
20 result of that decision, Your Honor, the charge of material
21 support was dropped against Mr. Khan.

22 The test military courts have used -- or have applied,
23 rather, to determine whether a convening authority is a

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1 type-three accuser is whether a reasonable person would
2 conclude that the convening authority has a personal interest
3 in the matter before the court. A personal interest has been
4 determined to be those matters affecting the convening
5 authority's ego, family, or personal property.

6 Mr. Reismeier clearly has a personal interest in the
7 outcome of this case, especially given its unique
8 circumstances involving the only guilty plea by a high-value
9 detainee, one who has chosen to cooperate despite his severe
10 mistreatment by the same government that is prosecuting him.
11 In a sense, the outcome of this case, Your Honor, will speak
12 to the efficacy of the system, the same system that
13 Mr. Reismeier for years worked to develop and maintain.

14 Mr. Reismeier's personal interest stems directly from
15 his years of sustained efforts to protect the fruits of his
16 labor and to advance his interpretation of the MCA, which
17 grants to the government, in his words, quote, the broadest
18 authority, end quote. This is apparent from his unyielding
19 alignment with the prosecution against detainees over years.

20 Not once in the belatedly disclosed discovery was
21 there any indication that Mr. Reismeier provided assistance to
22 the defense in these commissions. Despite his testimony
23 yesterday that he supports the defense equally, there is no

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1 evidence to -- of such support. A reasonable outside observer
2 could easily conclude that it appears that Mr. Reismeier has
3 only taken action in furtherance of the prosecution and
4 government's interest.

5 It is clear, based on his history of engagement with
6 the prosecution and his explicit desire not to undermine the
7 government's position, as demonstrated by the fact that he
8 gave the current Chief Prosecutor veto power over whether he
9 signed onto the Bahlul amicus brief, that when called on to
10 make a tough choice against Mr. Khan -- or in Mr. Khan's case,
11 rather, he will make whatever decision, in his own words,
12 isn't, quote, counterproductive, end quote, to the efforts of
13 the government.

14 I will not repeat it all here, Your Honor, but as
15 you've read, we lay out in detail in our pleadings, and the
16 documents produced by the prosecution show this as well,
17 Mr. Reismeier has a long history advancing prosecutorial
18 efforts of detainees like Mr. Khan, who was mentioned in
19 September 2006 by name by President Bush among the
20 12 individuals to be tried in military commissions at
21 Guantanamo.

22 In 2006, Mr. Reismeier helped to draft evidentiary and
23 procedural rules for military commissions at Guantanamo, and

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1 only a few years later served on the Detention Policy Task
2 Force, where he worked under the direction of the current
3 Chief Prosecutor specifically on military commissions, quote,
4 developing options for the lawful disposition of detainees
5 held at Guantanamo Bay.

6 And, Your Honor, that quote comes from the AE 040
7 Attachment F, the preliminary report of the Detention Policy
8 Task Force. That's the first sentence in that document.

9 Your Honor, I also want to note briefly, and my
10 co-counsel, Captain Lyness, will discuss the ongoing discovery
11 violations in greater detail, but it is -- it's inconceivable
12 that there are no responsive documents from Mr. Reismeier's
13 time on the Detention Policy Task Force. We know that
14 Mr. Reismeier was the chair of the sub-working group on
15 military commissions, working under the direction of the
16 current Chief Prosecutor.

17 We know that there was then, like now, only one
18 military commissions system dealing with only one class of
19 individuals, Guantanamo detainees, including Mr. Khan, whom
20 the military commissions were specifically set up to
21 prosecute.

22 We also know that for the first six months of the
23 Detention Policy Task Force's existence, when Mr. Reismeier

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1 was chairing the sub-working group on military commissions,
2 that according to the preliminary -- preliminary report from
3 the DPTF, which I just read -- quoted you, and I'll do so
4 again, that the DPTF, quote, focused much of its work on
5 developing options for the lawful disposition of detainees
6 held at Guantanamo. Those are the words from the task force
7 itself.

8 To state that such work was unrelated to Guantanamo
9 and, thus, Mr. Khan, is clearly not accurate. And to state
10 that there are no responsive documents, not even a single
11 responsive e-mail, is inconceivable. But again, my co-counsel
12 will address the discovery matters shortly.

13 Your Honor, Mr. Reismeier's personal interest in the
14 success of the military commission system at Guantanamo, and
15 to the government's prosecutorial efforts, extended beyond his
16 time on active duty in the Navy and is manifest in actions he
17 took between his retirement in 2015 and his appointment as
18 convening authority in May of 2019.

19 During this time, Your Honor, as a private citizen,
20 Mr. Reismeier remained closely connected to the current Chief
21 Prosecutor. He provided advice and support to the efforts of
22 the prosecutors, including by serving as a subject matter
23 expert -- those are Mr. Reismeier's words -- for the

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1 prosecution.

2 He participated in moots and served as a general
3 resource to the prosecution. And in his own words, yet again,
4 on the same team as the Office of the Chief Prosecutor.
5 Mr. Reismeier was so much a part of the team that the current
6 Chief Prosecutor sought his assistance on litigation strategy,
7 for example, asking Mr. Reismeier, quote, how best to plant in
8 judges' minds, end quote, specific objectives related to
9 detainee prosecutions.

10 Another time, the current Chief Prosecutor wrote
11 Mr. Reismeier seeking to, quote, leverage your familiarity
12 with the charges and facts to discuss the -- in all caps --
13 strategic question, end quote. This discussion was related to
14 the issue of intrinsic evidence.

15 Further in that same exchange Mr. Reismeier, proud of
16 the assistance that he had provided to prosecutors, notes that
17 intrinsic -- that the intrinsic evidence referenced is, quote,
18 part and parcel; I was talking about in the moot. Looks like
19 they got it. Nice work. End quote.

20 Your Honor, the prosecution has not disputed that it
21 has provided privileged materials to Mr. Reismeier over the
22 years. And, in fact, in our November hearings, it asserted
23 privilege over documents it shared with Mr. Reismeier. This

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1 exchange of sensitive information sometimes even came via
2 e-mail bearing the caption, quote, For Your Eyes Only, end
3 quote.

4 Your Honor, I -- if you can tell me -- if you would
5 like for me to -- to cite for you the attachments where I'm
6 drawing the quotes, or would you prefer that I just ----

7 MJ [COL WATKINS]: It would be helpful.

8 DDC [MR. MOSS]: Sure. Your Honor, that quote came from
9 AE 037F Attachment C, Tab 46, Bates 1010. This is, by the
10 way, Your Honor, the missing page of discovery that was not
11 disclosed to us until this past week, and I believe as we
12 discussed in the 802, will be submitted as a supplement to --
13 to that filing by the prosecution. But again, that's the one
14 that was missing.

15 If Mr. Reismeier was within the prosecution's
16 privilege, Your Honor, by definition, he was adverse to
17 detainees like Mr. Khan.

18 Turning to the second independent basis for
19 Mr. Reismeier's disqualification, his inelastic attitude,
20 which impairs his ability to impartially fulfill his statutory
21 obligations as convening authority.

22 Mr. Reismeier has already demonstrated through action
23 his preset and inelastic views on issues central to this

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1 specific case. Indeed, these actions are the manifestation of
2 his bias in favor of the prosecution, and it's chronicled in
3 e-mail after e-mail between Mr. Reismeier and prosecutors in
4 the Office of the Chief Prosecutor, including e-mails with the
5 current Chief Prosecutor in these commissions.

6 Mr. Reismeier has made his position clear with respect
7 to Mr. Khan's effort to seek pretrial punishment credit for
8 the years of torture and mistreatment he endured at the hands
9 of U.S. officials. Mr. Reismeier believes, as he testified
10 yesterday, based on his understanding of the law, such relief
11 is legally unavailable. As he said yesterday, Your Honor, he
12 knows this from his 25 years in the courtroom.

13 Strikingly, in what was, if not his first official act
14 as convening authority but certainly among his first official
15 acts, Mr. Reismeier arrogated from -- from, Your Honor, to
16 himself the authority to determine what law applies in this
17 case.

18 Mr. Reismeier was so confident in his view of the law
19 that he concluded that pretrial punishment credit is not
20 applicable in the military commissions as a matter of law. He
21 concluded that Mr. Khan does not even have the right to move
22 this commission to grant him pretrial punishment credit. And
23 on the basis of that conclusion, he took adverse action

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1 against Mr. Khan, despite Your Honor's ruling to the contrary
2 in AE 030M, which Mr. Reismeier decided should be interpreted
3 in a way that fit his preset views.

4 Only four days after his appointment as convening
5 authority in this case, and as Mr. Reismeier testified
6 yesterday, he made his decision to -- to reduce the number of
7 expert hours without having read Mr. Khan's pretrial
8 punishment motion. He did not even read the motion, yet he
9 assumed it was premised on Article 13, which he assessed did
10 not apply. Had he read the motion, he would have learned that
11 Mr. Khan's motion was based on more than Article 13.

12 He also testified that he read the portion of the plea
13 colloquy addressing waiver, but despite the parties and the
14 military judge at the time agreeing on the terms and the
15 meaning of that waiver, Mr. Reismeier arriving -- excuse me --
16 on the meaning of that waiver and arriving to a clear meeting
17 of the minds, as evidenced in the colloquy, Mr. Reismeier
18 concluded that it was ambiguous and decided to resolve that
19 ambiguity in favor of the prosecution, which I'll note, Your
20 Honor, is -- was contradicted by a statement that he made
21 yesterday as well when he said that such ambiguity would be
22 resolved against the government.

23 Further, Your Honor, Mr. Reismeier didn't -- didn't

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1 read the motion to compel witnesses. Rather, he assumed what
2 Mr. Khan's arguments were and, thus, misinterpreted Your
3 Honor's ruling granting our motion. The point, Your Honor, is
4 that Mr. Reismeier was plainly indifferent to the prior
5 proceedings in this case concerning the pretrial punishment
6 issues and instead effectively put those pleadings aside and
7 substituted his own judgments about the availability of
8 pretrial punishment credit in commissions.

9 However, reducing the number of expert hours available
10 to Mr. Khan didn't go far enough. Mr. Reismeier went even
11 further to make clear that he is the authority on what is
12 permitted under the law in these military commissions.

13 Similar to the threats made by the current Chief
14 Prosecutor in this case, his friend, General Martins,
15 Mr. Reismeier raised the possibility that Mr. Khan's
16 litigation of a pretrial punishment motion would violate the
17 plea agreement and which Mr. Khan understood as a threat.
18 Indeed, prior to the argument on the pretrial punishment
19 motion, Your Honor addressed this possibility with Mr. Khan to
20 ensure that he understood it.

21 The second action, Your Honor, threatening to deem as
22 noncooperation Mr. Khan's pursuit of pretrial punishment
23 credit demonstrate Mr. -- demonstrates Mr. Reismeier's bias

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1 and foretells how that bias will manifest when Mr. Reismeier's
2 required as convening authority to take final action on
3 Mr. Khan's adjudged sentence.

4 Upon the recommendation of his friend, the current
5 Chief Prosecutor, Mr. Reismeier must determine whether
6 Mr. Khan has cooperated and, per the terms of his pretrial
7 agreement, approve a sentence not to exceed 19 years. This
8 final action by the convening authority is profound in what
9 the U.S. Court of Military Appeals characterized in Nix as,
10 quote, a judicial power far in excess of that which resides in
11 any other single judicial officer.

12 These two adverse actions already taken by
13 Mr. Reismeier against Mr. Khan, the reduction in expert hours
14 and the threat to withdraw from Mr. Khan's pretrial agreement,
15 raise substantial concerns about Mr. Reismeier's inelastic
16 attitude towards issues central to this case. And these
17 adverse actions also raise serious concerns over
18 Mr. Reismeier's independence of the Office of the Chief
19 Prosecutor, the same office which he has repeatedly -- with
20 which he has repeatedly aligned himself over the years and
21 from which, as 1,000 pages of belatedly-disclosed discovery
22 show, he was never more than a phone call away.

23 Further, to Mr. Reismeier's inelastic attitude, in a

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1 sense it is understandable that Mr. Reismeier would view
2 himself as the authority on issues related to military
3 commissions at Guantanamo. After all, he drafted the Military
4 Commissions Act and its associated rules and regulations, and,
5 as he testified yesterday, he is the last man standing, at
6 least he believes himself to be.

7 What's more, is the office of -- of the Chief
8 Prosecutor has routinely reinforced Mr. Reismeier's belief as
9 the last man standing and reinforced his ego by paying homage
10 to him by repeatedly calling on him to serve as their subject
11 matter expert. This adulation, by the Chief Prosecutor in
12 particular, toward Mr. Reismeier is revealed in the
13 belatedly-disclosed discovery.

14 For example, when the current Chief Prosecutor says in
15 a 2015 e-mail to Mr. Reismeier, then a private citizen
16 assisting the Office of the Chief Prosecutor, quote, Your
17 career remains a model one and has made our nation more secure
18 and just, end quote.

19 Your Honor, that is AE 037F Attachment C, Tab 21,
20 Bates 0088.

21 And again, nine months later in another e-mail
22 exchange, the current Chief Prosecutor tells Mr. Reismeier,
23 quote, Your continuing assistance to this vital mission is so

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1 deeply appreciated, end quote.

2 Your Honor, that is AE 037F Attachment C, Tab 45,
3 Bates 0893.

4 And again, the following month in yet another e-mail,
5 the current Chief Prosecutor writes to Mr. Reismeier, quote,
6 You are such a friend, Chris, and when this marathon ends,
7 there will be time and opportunity for me to show you how much
8 you have meant to me, end quote.

9 Your Honor, that comes from AE 037F Attachment B, Tab
10 4, Bates 0018.

11 And in response to that e-mail wherein Mr. -- excuse
12 me, the current Chief Prosecutor tells Mr. Reismeier that he
13 will have time and opportunity to show him how much he has
14 meant to him, Mr. Reismeier responds, quote, You are a good
15 man and a great American, Mark, and I'm grateful for our
16 friendship. Happy to help in any small way I can. I remain a
17 true believer in commissions as a valuable tool for our
18 resources and feel obligated to do what I can to support them
19 and those trying to make them work.

20 That's the same attachment, Your Honor, AE 037F
21 Attachment B, Tab 4, Bates 0019.

22 Your Honor, Mr. Reismeier's inelastic attitude and
23 preset views formed over years working alongside his friend,

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1 the current Chief Prosecutor, as a principal architect and
2 repairman for this very military commission system. His
3 inelastic attitude and preset views are the cause for the
4 adverse action he has taken already against Mr. Khan and are
5 demonstrative of a lack of independence from the Office of the
6 Chief Prosecutor.

7 It's worth noting, Your Honor, that Mr. Khan's case in
8 particular, in addition to Mr. Reismeier's judicial
9 responsibility of taking final action on Mr. Khan's adjudged
10 sentence, his inelastic attitude also raises substantial
11 questions as to his ability to execute his post-trial
12 responsibilities, including conducting an impartial
13 examination of Mr. Khan's eventual clemency petition.

14 While Mr. Reismeier testified that he believes he
15 would be impartial in evaluating Mr. Khan's eventual clemency
16 petition, respectfully, Your Honor, his view on the matter is
17 not determinative, nor does it address the concern that a
18 reasonable outside observer would perceive him to be biased.
19 Mr. Khan, whose liberty is at stake, is also concerned.

20 As the CAAF put it in -- in United States v. Fernandez
21 the presence of an inelastic attitude suggests that the
22 convening authority will not adhere to appropriate legal
23 standards in the post-trial review process and that he will be

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1 inflexible in reviewing convictions because of his
2 predisposition to approve certain sentences.

3 The only legal standard, Your Honor, or interpretation
4 of law in these commissions it appears Mr. Reismeier believes
5 is appropriate is the one that he came up with as the drafter
6 of the Military Commissions Act. As he said yesterday in
7 reference to his decision, reducing Mr. Khan's expert hours
8 due to his conclusion that pretrial punishment leave is not
9 applicable, that decision was based on his 25 years in the
10 courtroom.

11 Your Honor, we respectfully submit that Mr. Reismeier
12 should be disqualified to avoid an appearance of conflict and
13 partiality, which we further submit is an actual conflict as
14 demonstrated through the 1,000 pages of initially withheld,
15 belatedly disclosed and, as my co-counsel, Captain Lyness,
16 will explain, still incomplete discovery.

17 While this standard, Your Honor, codified in
18 R.M.C. 902, makes clear that judges must be disqualified if
19 there exists an appearance of partiality, we submit that this
20 standard is especially instructive in the context of a
21 convening authority for a military commission where, unlike in
22 the court-martial context, the convening authority here has no
23 command responsibilities. Indeed, Mr. Reismeier acknowledged

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1 that he was without command responsibilities. He did so in
2 his testimony yesterday.

3 The convening authority's role as a quasi-judicial
4 actor is acute in the military commissions and more akin to a
5 judge in a civilian ----

6 MJ [COL WATKINS]: Can you clarify your last point?
7 What's the significance of a convening authority not having
8 command responsibility?

9 DDC [MR. MOSS]: Your Honor, when -- in a review of the
10 case law, there has been concern expressed by courts in --
11 particularly when a convening authority has been -- been
12 alleged to be an accuser because of actions that they took
13 as -- in the capacity of a commanding officer that also has
14 the responsibility of convening, for example, a court-martial.
15 That might be issuing an order to transfer an accused from the
16 custody of one entity to another, despite -- and that -- and
17 such a decision, Your Honor, would be the sole province of the
18 commanding officer who also happened to be a convening
19 authority.

20 MJ [COL WATKINS]: In retaliation, for example?

21 DDC [MR. MOSS]: Not in retaliation, but just in the
22 course of his normal -- in the execution of his normal command
23 responsibilities.

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1 MJ [COL WATKINS]: Right. Which are absent in ----

2 DDC [MR. MOSS]: Which are absent here, yes, Your Honor.

3 MJ [COL WATKINS]: I guess I'm missing your point of what
4 the significance of that is.

5 DDC [MR. MOSS]: The significance, Your Honor, is despite
6 assertions by accused that -- let me back up, Your Honor.

7 MJ [COL WATKINS]: The convening authority's command
8 responsibilities could allow him or her to take measures that
9 would be adverse to an accused if that convening authority had
10 a personal interest in the case. Mr. Reismeier has little
11 control, outside of his statutory responsibilities, to affect
12 others. So -- and I don't want to interpret your argument
13 that way ----

14 DDC [MR. MOSS]: Sure.

15 MJ [COL WATKINS]: ---- but that's the way I'm seeing it.
16 So I don't understand the significance of a lack of command
17 responsibility.

18 DDC [MR. MOSS]: Your Honor, it's that there has been --
19 courts have been deferential to the -- to the -- to a
20 convening authority exercising those command responsibilities,
21 particularly when an accused has asserted that, as a result of
22 the execution of those command responsibilities, the convening
23 authority is an accuser.

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1 And here, that deference and leeway as to that
2 heightened concern as to whether or not the convening
3 authority is an accuser as a result of -- of the execution of
4 command responsibilities is not relevant.

5 MJ [COL WATKINS]: Okay. I think I understand your point.

6 DDC [MR. MOSS]: Thank you, Your Honor.

7 MJ [COL WATKINS]: Thank you.

8 DDC [MR. MOSS]: As Mr. Reismeier acknowledged yesterday
9 in testimony, in the military commissions system, the judge
10 and the convening authority have a shared responsibility in
11 the exercise of a range of judicial responsibilities.
12 Likewise, the U.S. Court of Military Appeals noted in Nix, in
13 military law the convening authority performs a number of
14 judicial functions, to the extent that he may disapprove
15 entirely the action of a court-martial and convening
16 authority -- and the convening authority possesses a judicial
17 power far in excess of that which resides in any other single
18 judicial officer.

19 As we discussed in our papers and touched on
20 previously just now, Mr. Reismeier has a long history of
21 aligning himself squarely with the Office of the Chief
22 Prosecutor. There are dozens of e-mails back and forth
23 between Mr. Reismeier and prosecutors, including numerous

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1 e-mails between the current Chief Prosecutor and
2 Mr. Reismeier, spanning his time on active duty and as a
3 private citizen, still working to advance the government's
4 prosecutorial interest.

5 Mr. Reismeier, who declared himself to be, quote, on
6 the same team, end quote -- Your Honor, that's AE 037F
7 Attachment B, Tab 13, Bates 0054.

8 Mr. Reismeier, who declared himself to be on the,
9 quote, same team, end quote, as the prosecution was so
10 committed to seeing the government succeed in its prosecutions
11 in the military commissions that even in retirement he
12 supported the efforts of his friend, Brigadier General
13 Martins, and the efforts of the Chief Prosecutor, making at
14 his own expense multiple eight-hour round trips by -- by car
15 from his house to the Office of the Chief Prosecutor to
16 provide pro bono assistance to prosecutorial efforts,
17 providing guidance and counsel on litigation strategy.

18 Your Honor, I struggle to articulate just how clear it
19 is, and obvious, that Mr. Reismeier's conflicts are stemming
20 from his years-long relationship with the current Chief
21 Prosecutor and the prosecution in these military commissions.
22 So perhaps it's best to quote Mr. Reismeier himself from an
23 October 2009 e-mail. This is AE 037F Attachment C, Tab 13,

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1 Bates 0054, "We are all on the same team."

2 And then in May 2015, there are -- there are a few
3 quotes. This is AE 037F Attachment B, Tab 6, Bates 0024.
4 This is in an e-mail exchange with the associate general
5 counsel at the Department of Defense.

6 "I've had too much contact with Mark Martins, and some
7 others, discussing some of the provisions we drafted for the
8 MCA, all of which are at issue in the cases. There is no" --
9 end quote. Quote, There is no way I would survive a challenge
10 under the judicial canons.

11 Quote, Everyone sees my position as problematic.
12 Unlike others who have had past contact with the commissions,
13 I have been in direct conversations with litigants about
14 provisions at issue in the cases, and in Mark's case, with the
15 Chief Prosecutor, whose reach goes into all the cases. That
16 would include this case, Your Honor, Mr. Khan's case.

17 MJ [COL WATKINS]: Is that quote not in context of a
18 judicial position?

19 DDC [MR. MOSS]: That quote is in context of a judicial
20 position, Your Honor, but I am making the argument that we
21 believe that that standard is specifically instructive here in
22 considering whether or not to disqualify Mr. Reismeier, given
23 the unique context of -- of this -- of this case, this

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1 commission, and his position in it, his role in it.

2 Also from May 2015, "I have no doubts about my
3 partiality, but the appearance is just not acceptable for a
4 judge in deciding these cases." Again, Your Honor, as you --
5 as you noted, this is in the context of a discussion about
6 becoming a trial judge or appellate judge.

7 In an October 2015 e-mail -- this is after
8 Mr. Reismeier's retirement, and this is AE 037F Attachment B,
9 Tab 3, Bates 0010, in an e-mail to the current Chief
10 Prosecutor seeking permission to sign onto an amicus brief,
11 Mr. Reismeier writes, "If you have objections to me signing
12 on, I won't. I don't want to do something that might be
13 counterproductive for the government," end quote.

14 I'll note, Your Honor, that the content of this e-mail
15 exchange cannot be reconciled with either Mr. Reismeier's
16 recusal memoranda, in which he says OMC-P had nothing to do
17 with his joining the amicus brief, or with representations
18 made to this commission by the prosecution in AE 037A
19 (Corrected Copy).

20 Your Honor, another from November '16 in reference to
21 the military commissions at Guantanamo. And this is AE 037F
22 Attachment B, Tab 53, Bates 0929. This is an e-mail exchange
23 between Mr. Reismeier and Mr. Paul Lekas, the Deputy General

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1 Counsel at the Department of Defense, after Mr. Reismeier was
2 informed that his myriad conflicts were seen as problematic to
3 his selection as convening authority.

4 Mr. Reismeier states, quote, I remain a believer in
5 the brand. Mr. Reismeier -- that -- end quote, Your Honor.
6 Mr. Reismeier ultimately was not selected for the position, as
7 we discussed yesterday.

8 Your Honor, Mr. Reismeier and the prosecution now,
9 years later, try as they may to rewrite history, but the plain
10 reading of each of Mr. Reismeier's e-mail exchanges clearly
11 reveals what he meant at the time. For example, in the
12 context of Mr. Reismeier's e-mail exchanges with the current
13 Chief Prosecutor regarding the amicus brief in Bahlul, from
14 which I just quoted, it is simply without merit to suggest
15 that he wasn't doing exactly what the e-mail makes clear,
16 giving the current Chief Prosecutor a veto over whether he
17 signed onto the amicus brief. A plain reading makes that
18 clear.

19 The prosecution would like for Your Honor, the public,
20 and Mr. Khan to believe that Mr. Reismeier's unambiguous
21 conflicts, the substance of which they do not dispute, are
22 irrelevant to his service as convening authority; that they
23 simply don't matter; that they are of no consequence.

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1 The prosecution would like for Your Honor, the public,
2 and Mr. Khan to believe that Mr. Reismeier's years of close
3 sustained contact with the prosecution, his unwavering
4 willingness and on-call availability to provide counsel on
5 litigation strategy in furtherance of the Office of the Chief
6 Prosecutor's efforts to prosecute detainees like Mr. Khan,
7 including for charges that are attendant here.

8 The prosecution would like you to believe, the public
9 to believe, and Mr. Khan to believe that this is irrelevant;
10 that they simply don't matter; that they are of no
11 consequence.

12 Your Honor, we respectfully submit that this is not
13 the case, that it cannot be the case. For to accept the
14 prosecution's argument that Mr. Reismeier's clear and
15 historical bias in favor of the prosecution's are -- in favor
16 of the government in matters related to the prosecution of
17 detainees like Mr. Khan doesn't matter, it would be to accept
18 a proposition that is inconsistent with the cornerstone of our
19 legal tradition, civilian and military justice alike; that
20 justice demands impartially, especially from those making
21 critical decisions that impact an individual's liberty, as we
22 have here and with the convening authority and Mr. Khan.

23 The prosecution would have Your Honor, the public, and

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1 Mr. Khan believe that Your Honor is without authority to
2 disqualify Mr. Reismeier as convening authority on the basis
3 of an appearance of conflict. They cannot be more wrong. As
4 the United States Court of Military Appeals said 65 years ago
5 in the United States v. McClenny, the omission by Congress and
6 the President of a specific statement of condemnation does not
7 mean this court is powerless to condemn conduct which destroys
8 the integrity of a trial. On the contrary, it is not only
9 within our power, but it is our duty to guard against any
10 infringement on the fundamentals of a fair trial.

11 Not one time, Your Honor, did -- did Mr. Reismeier
12 express during his testimony that he thought that any of his
13 e-mails or activities assisting the prosecution could be
14 perceived as showing partiality or otherwise raise eyebrows.
15 No one disputes Mr. Reismeier's sincerity when he states about
16 his service as convening authority in Mr. Khan's case. "I
17 don't see a conflict," as he said yesterday during testimony.

18 Mr. Reismeier's sincerity in his belief that he is
19 impartial is not dispositive here. As the Supreme Court in
20 Williams v. Pennsylvania stated "Bias is easy to attribute to
21 others and difficult to discern in one's self." We
22 respectfully submit this aptly characterizes the circumstances
23 in this case involving Mr. Reismeier.

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1 Your Honor, we ask that in the interest of preserving
2 the integrity of these proceedings for the public and for
3 Mr. Khan, you hold Mr. Reismeier to his own standard, the same
4 standard he applied in recusing himself in the Nashiri and
5 Bahlul commissions; that the appearance of partiality is good
6 reason why he should not serve as convening authority for this
7 military commission.

8 Thank you, Your Honor.

9 MJ [COL WATKINS]: Thank you, Mr. Moss.

10 Captain Lyness.

11 DDC [CPT LYNESS]: Your Honor, may it please the
12 commission. Before I begin, I would like to ensure that one
13 point is abundantly clear here.

14 In light of everything that has transpired over the
15 last five months, Mr. Khan has been steadfast in his
16 commitment to cooperation and assisting the government
17 wherever possible. He stands committed to his pretrial
18 agreement. He stands ready and willing to cooperate whenever
19 called upon. Nothing in this motion or the argument changes
20 that.

21 Why are we here, Your Honor? Since June 28th, 2019,
22 the prosecution systematically ignored their discovery
23 obligations. On July 25th and August 12th, the prosecution

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1 appears to have misrepresented to the defense on the existence
2 of responsive discovery. We are here because the prosecution
3 appears to have misrepresented to this commission on the
4 existence of responsive discovery. On September 13th, this
5 commission relied on those misrepresentations and ordered a
6 ruling consistent with the prosecution's assertions.

7 But we are also here because this commission warned
8 the prosecution, warned them that they must uphold their
9 discovery obligations, and if they failed to do so, that the
10 consequences would be dire.

11 We are here because the defense was delivered 1,000
12 pages of discovery 90 minutes before the scheduled testimony
13 of the convening authority back on November 19th, 2009 --
14 2019.

15 We are here because the prosecution's failures have
16 occurred multiple times over and are still ongoing.

17 Finally, we are here because, as Your Honor explained
18 on November 19th, these discovery violations can serve either
19 as an independent basis for recusal or they may have a
20 cumulative effect with the other bases of disqualification.

21 And since November, the thousand pages of discovery
22 only strengthen the defense's claim that this commission
23 should grant a just remedy in the form of disqualifying

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1 Mr. Reismeier as the convening authority over Majid Khan's
2 case.

3 Now, Your Honor, I'd like to just address the roadmap
4 of what I'd like to address here for you today. Turning to
5 the issues, first I would like to address each discovery
6 violation separately. The magnitude of the violations are two
7 separate and distinct issues and have continued up until last
8 week.

9 Second, I would like to address how the prosecution's
10 actions and these violations have harmed Mr. Khan specifically
11 and end with why the disqualification of the -- of the
12 convening authority is a just remedy given these violations.

13 Before I start on the first discovery violation, I
14 want to outline a few preliminary dates and facts that make up
15 the background:

16 On June 27th, 2019, in response to the convening
17 authority's recusal memorandum and subsequent supplement
18 recusal, the defense filed a request to continue the July
19 hearings in order to effectively investigate the convening
20 authority's conflicts and requested in that pleading documents
21 and information relating to the convening authority's
22 disqualification on AE 035F.

23 The following day, this commission granted the

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1 continuance but denied the defense's request for documents and
2 materially -- material related to the convening authority's
3 disqualification but did state affirmatively that the defense,
4 quote, may follow generally accepted discovery practices in
5 requesting the information sought from the government and, if
6 denied, file appropriate relief. AE 035G.

7 June 28th, 2019, Your Honor, bookends the start of the
8 prosecution's notice. It provides notice that the defense was
9 seeking responsive material relating to the disqualification
10 of the convening authority, and, more importantly, it provides
11 notice to the prosecution that the defense would be entitled
12 to discovery based on the commission's ruling. June 28th
13 starts the clock on the first prosecution's discovery
14 violation.

15 In turning to that violation, the bottom line is this,
16 Your Honor: Between June 28th and September 17th, 2019, the
17 government either came into possession of responsive material
18 or failed to search for responsive materials in the first
19 place. Then the prosecution appears to have misrepresented to
20 the defense on their existence and then appears to have
21 misrepresented to this commission on their existence, thus
22 forcing the commission to have no choice but to rely on that
23 misrepresentation and ruled against the defense's request to

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1 compel discovery.

2 And throughout that time, Your Honor, not once -- not
3 one time has the prosecution corrected their misstatements.
4 Although extensively briefed in AE 040D, the government never
5 responds to the three months between June and September of
6 2019. They don't mention it once in their response. They
7 don't seek classification from Mr. Reismeier. They make no
8 mention of this time frame whatsoever. This time is merely
9 glossed over.

10 In general, Mr. Reismeier's testimony yesterday only
11 confuses the issue. When asked when he conducted the search
12 and whether he had specifically seen Mr. Khan's discovery
13 request before conducting the search, he stated yesterday, "I
14 don't know what the date is. I would be guessing. It would
15 be during the summer. It would have been -- yes. But whether
16 that was, you know, June, July, or August, I don't recall.
17 Again, I would say this. You know, I would ask that you just
18 keep in mind this is not only the -- the case whether I was
19 asked for this information, any information that I had with
20 regard to prior contacts, so I may have actually done the
21 global search before I saw your discovery request. I just --
22 I'm not sure which one occurred first."

23 So many questions still remain, Your Honor, and

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1 Mr. Reismeier didn't clear that up. It's unclear whether he
2 searched in June or September -- June, July, anytime in
3 between.

4 So the questions still remain, Your Honor: Did the
5 prosecution search during this time frame? Did the
6 prosecution present the convening authority or his legal
7 advisor with Mr. Khan's discovery request? Who did they seek
8 responsive documents from? And when did they seek the
9 responsive material? Did they search -- go to other agencies?
10 Why couldn't they have searched Mr. Reismeier's military
11 e-mails? As Mr. Reismeier said yesterday, only the
12 prosecution knows the answer to these questions.

13 But before I get ahead of myself, I would like to
14 provide some further context and factual background to this
15 violation.

16 On July 17th, 2019, the defense once again requested
17 documents and information relating to the disqualification of
18 the convening authority in AE 037 Attachment C. I'd like to
19 point out two specific requests that are not exhaustive, but
20 illustrative of the two violations.

21 First, in Defense Request Number 2, the defense
22 requested all documents relating to Mr. Reismeier and the
23 applicability of Article 13 credit. Same AE 037 Attachment C.

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1 Next in that same attachment, Defense Request Number 6
2 requested information and material relating to Mr. Reismeier's
3 application, consideration, nomination, and/or selection as
4 the convening authority. The defense specifically inquired to
5 communications between four offices who might possess that
6 information.

7 The following week, in response to the defense's
8 motion to compel -- to the defense discovery request, the
9 prosecution responded as follows:

10 To Request Number 2, quote, The government has no
11 discoverable information to provide. AE 037 Attachment D.

12 Pertaining to Request Number 6, in addition to not
13 specifically answering the defense's request at all, the
14 prosecution once again stated, quote, The government has no
15 discoverable information to provide. Same Attachment D.

16 The next day, in an effort to avoid delay, reduce
17 litigation, and reduce surprise, the defense e-mailed the
18 prosecution to inquire to what this ambiguous statement meant.
19 What does "The government" -- quote -- "has no discoverable
20 information to provide?" Does it mean they searched and none
21 existed? Does it mean you searched and found documents but
22 don't believe such documents are relevant material? What did
23 it mean? A simple question could have easily been answered,

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1 but instead, the prosecution chose gamesmanship.

2 Commander O'Dowd responded to Mr. Dixon's question and
3 stated, quote, Wells, I can say that the prosecution has
4 provided information in response to your requests and within
5 the time requested. We do not have additional comments to
6 provide at this point. That's AE 037 Attachment H.

7 Next, on July 29th, 2019, pursuant to this
8 commission's ruling, the defense filed AE 037, a defense
9 motion to compel production of documents. On August 12th, the
10 defense -- the government responded to the defense motion to
11 compel, stating generally, quote, The commission should deny
12 the motion to compel because there are no documents responsive
13 to the defense's request. AE 037A at 012, page 12.

14 Then in responding to the defense Request Number 6 in
15 relation to Mr. Reismeier's application and consideration
16 question, the prosecution changes, this time with a different
17 quote, a different statement. Quote, There are no e-mails
18 that meet the criteria identified by the defense. Same
19 AE 037A at page 19. This time the prosecution affirmatively
20 states that no e-mails exist that meet the defense's request;
21 different from what they previously told the defense.

22 On September 13th, 2019, this commission relied on the
23 government's assertions and concluded specifically, as it

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1 related to Request Number 6, quote, The government in its
2 response attests there is, quote, No evidence which is
3 responsive to the defensive theory. The government is aware
4 of its discovery obligations. If there is no responsive
5 material, information, then any order by this commission to
6 produce it is of no effect.

7 AE 037C, 5 through 6. This commission relied on the
8 government's false assertions that there were no e-mails.

9 However, in that ruling the commission didn't just
10 stand on that fact. The commission made it very clear by
11 stating, "The commission reminds the government their search
12 for responsive information must go beyond the files maintained
13 in the Office of the Chief Prosecutor, extending, when
14 necessary, to other Executive Branch agencies, especially
15 those identified by the defense in its discovery request. And
16 further, it is incumbent upon the prosecution to execute this
17 duty faithfully because the consequences are dire if it fails
18 to do so."

19 Your Honor, just like the trial judge in
20 United States v. Stellato, who warned the prosecution that
21 they were, quote, inviting disaster by not producing
22 discovery, here too, this commission warned the prosecution
23 that the consequences would be dire if it failed to execute

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1 their duties faithfully.

2 And in response to this commission's warning in
3 AE 037C, by all accounts and with all the evidence that's in
4 front of us, the government and the prosecution did nothing.
5 They took no action. They once again did not correct the
6 record. They did not produce responsive material. By all
7 accounts, they did not continue to search within their own
8 office or outside to Mr. Reismeier. There is -- in fact,
9 there is simply no evidence they searched anywhere.

10 Even though three days after this commission's ruling
11 the 9/11 judge ordered the prosecution in that case to produce
12 discovery related to the same issue. From June 28th, 2019
13 until September 17th, the prosecution did not uphold their
14 discovery obligations. It was continual and it was egregious.
15 Up to this point the prosecution has never addressed this time
16 frame or presented any rationale for why nothing occurred.

17 Now, Your Honor, turning to the second discovery
18 violation. Starting on September 17th, 2019, the bottom line
19 is that a large portion of these documents seemed to be --
20 have created or printed on September 17th, 2019, and were
21 known to the prosecution that they existed, and approximately
22 six weeks passed before they notified the defense of their
23 mere existence. This failure violated R.M.C. 701(a)(5).

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1 And, in fact, it was not until the defense personally
2 reached out to the prosecution requesting these documents on
3 October 29th, 2019, that the prosecution even acknowledged
4 their existence. It took the defense to reach out to them to
5 seek confirmation.

6 September 17th is when by -- by -- Mr. Reismeier's
7 e-mail accounts were created. This is indicated on the
8 headers of all of Mr. Reismeier's e-mails that state 9/17/2019
9 with a corresponding subject of the e-mail. This date is the
10 best guess on when these documents were actually made known to
11 the Khan prosecutors.

12 Once again, only these prosecutors know when exactly
13 these documents were made available to them and when they came
14 into existence. It certainly could have been much sooner. As
15 Mr. Reismeier testified yesterday, maybe it was June, July, or
16 August. He just didn't know.

17 It is fair to say when these documents were printed,
18 they must have been known to these prosecutors. The
19 prosecution explains in their response that the -- the delayed
20 discovery was, quote, complicated by the 9/11 Commission
21 sealing order.

22 But that's not what the discovery rules mandate. They
23 were not forced to turn over these documents and hamstrung

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1 because of another commission. 701(a)(5) merely requires
2 notification. All they had to do was send a pleading of
3 notice to the defense, the commission, of the existence of
4 these documents and that they were working diligently to
5 produce them. And they didn't do that.

6 They didn't do so on September 17th or September 27th
7 when the 9/11 prosecutors began turning those documents over
8 to that commission. They didn't do so on October 8th, when
9 supplemental filings were made in that commission. They
10 didn't do so on October 24th, which is when the prosecutors in
11 this case first identified and stated that they reviewed or,
12 quote, re-reviewed the documents.

13 They claimed in AE 037F at page 2 and 6 that they,
14 quote, reviewed, and then later on in AE 40E at page 4, that
15 they had re-reviewed the documents on October 24th. Which one
16 is it? As I illustrated earlier, in fact, it was not until
17 the defense specifically e-mailed the prosecution and asked
18 them for the documents on October 29th that they, in fact,
19 acknowledged their existence.

20 This idea that they were, quote, confused or
21 complicated by the 9/11 Commission is simply not credible by
22 the R.M.C. rules of discovery which require and what mandate
23 them to do. The rules expect a bare minimum of responsiveness

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1 when it comes to acknowledging receipt of discovery, and the
2 government couldn't uphold that minimum bar.

3 Even after notifying the commission and the defense of
4 the existence of these documents in AE 037F, the prosecution
5 continued to argue incorrectly that only six documents were,
6 quote, arguably material to the defense, at AE 037F at page 7.

7 Finally, when all thousand pages were eventually
8 turned over to the defense, the first tab, the first page the
9 defense opened was an e-mail from Mr. Reismeier --
10 Mr. Reismeier with the subject, quote, Article 13 credit, the
11 same thing that the defense had acted -- asked it for on
12 July 17th, 2019.

13 The thousand pages further contained the chronology of
14 Mr. Reismeier's application and consideration for -- for each
15 one of his applications with the OMC and both times that he
16 was considered for his position of the CA, clearly relevant
17 and material to what the defense asked back on July 17th of
18 Defense Request Number 6. Documents, e-mails, and material
19 that the prosecution previously said didn't exist were all
20 produced as relevant and material to the defense 90 minutes
21 before the hearing on November 19th.

22 Overall, it's very clear that the government knew of
23 their discovery obligations and failed to notify the

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1 commission of the existence of said documents. They cannot
2 overcome that bar, the bare minimum of disclosure
3 responsibilities.

4 Next, Your Honor, turning to the -- turning to these
5 ongoing discovery issues that I'd like to point out, and it's
6 important, the last two concrete identifiable time frames and
7 the discovery issues in each one of them. But the defense is
8 continuing to battle, continuing to ask for responsive
9 material, and continually being stonewalled at this present
10 time.

11 After reviewing and investigating the thousand pages
12 of discovery, it became clear to the defense that additional
13 documents, attachments, and e-mails still were missing from
14 what was previously provided.

15 On December 27th, 2019, the defense requested
16 additional documents and material specifically requesting
17 complete e-mail chains.

18 On January 21st, 2020, the government responded to
19 this request and did -- did not provide all of the complete
20 e-mails. We know this because on February 18th, 2020,
21 additional discovery was provided to the defense -- and that's
22 the supplement that we've talked about previously, Your Honor,
23 at Tab 46 -- a document which does have substantive value. It

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1 outlines the second half of an e-mail chain where General
2 Martins is relaying to Mr. Reismeier his interpretation of the
3 Military Commissions Act and how it intended to have broader
4 evidentiary standards for issues involving the confrontation
5 clause in comparison to Article III courts. It was not simply
6 an oversight. It had substance.

7 In that January 21st response, the government further
8 stonewalls the defense citing eerily similar language to
9 before, that, quote, There are no other relevant documents
10 that are responsive to your request. AE 040 Attachment K.

11 The prosecution goes further and denies additional
12 discovery based on the protection of attorney work privilege
13 and, quote, other applicable privileges.

14 Mr. Reismeier confirmed yesterday that the prosecution
15 never came back to him to ask for responsive material. He
16 knew that for a fact. One thing he was clear on. After being
17 served again for requests for responsive documents, the
18 prosecution -- prosecution, once again, never went to the most
19 logical place and source where the documents could be found.
20 They never went back to Mr. Reismeier.

21 Finally, as Mr. Reismeier outlined yesterday, he says,
22 quote, It's possible that other responsive material exists,
23 which leads into Mr. Khan's injury. Mr. Khan's substantive

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1 rights have been harmed by the prosecution's multiple
2 discovery violations and the harm is ongoing. The harm is
3 that this commission could take action without knowing the
4 full story.

5 If this commission were not to order the
6 disqualification of Mr. Reismeier, Your Honor would be making
7 the decision blind. After hearing Mr. Reismeier testify
8 yesterday, it is clear that he failed to make a deliberative
9 and calculated approach to finding responsive material. When
10 asked how did you know what to search for -- question, "Did
11 somebody tell you what to search for?" -- Mr. Reismeier
12 answered, "I assume that was probably conveyed but because
13 this is not the only case where I am involved in this process,
14 I simply did a search for anything that had to do with the
15 military commissions," end quote. He could not affirmatively
16 answer if he had ever seen Mr. Khan's request before making
17 any searches within his own personal e-mail.

18 Mr. Reismeier's solution to search for, quote,
19 anything to do with the commission is a flawed process for
20 conducting discovery. He didn't explain how or what search
21 terms he used. Taking his word, he was able to exhaustively
22 search for over ten years of material and records relating to
23 the military commissions without applying Mr. Khan's discovery

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1 request.

2 It's like being asked to produce financial records in
3 response to the search, but how could you even know what
4 you're searching for? Are we asking for tax records? Are we
5 asking for bank statements, mortgage, student loan, credit
6 cards? We simply wouldn't know without applying a discovery
7 request, Your Honor. It's simply producing discovery blindly.

8 In addition to the testimony yesterday, further
9 outlined that it is highly likely that documents still exist,
10 Mr. Reismeier only searched his Gmail. He said it was simple.
11 His service e-mail accounts were not searched or at least not
12 to his knowledge. He stated that it's possible e-mails exist
13 in his navy.mil account. He stated that it's possible that
14 e-mails exist from his time at the DPTF. And Mr. Reismeier
15 further asserted that it would have to be the prosecution who
16 would have to answer these questions regarding the missing or
17 unsearched locations.

18 What will happen if and, arguably, when additional
19 discovery is produced in this commission or another? Where
20 will that leave this commission in making a decision regarding
21 discovery violation and the disqualification of Mr. Reismeier
22 serving as convening authority?

23 The prosecution alludes that Mr. Khan was not injured;

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1 and even if he were injured, the requested remedy of
2 disqualification is too severe.

3 Since June of 2019, a cloud has presided over
4 Mr. Khan's commission, a cloud relating to cooperation credit,
5 clemency, and threatening noncompliance with his pretrial
6 agreement. Mr. Khan's injury is unique to him and not
7 analogous to other commissions. Mr. Khan's PTA makes him
8 different and makes his injury more severe.

9 And finally, Your Honor, turning to the remedy. The
10 defense's proposed remedy of the disqualification of
11 Mr. Reismeier is sensible, not drastic, and is based entirely
12 on the facts and circumstances, based on what the prosecution
13 has done and their multiple and ongoing discovery failures.

14 Now, the government wants to assert that the
15 disqualification of the convening authority would result in a,
16 quote, windfall for the defense. That conclusion is wrong for
17 many reasons.

18 If the CA were disqualified in Mr. Khan's case, what
19 would happen? Nothing, by all accounts. The convening
20 authority would become the Secretary of Defense. Mr. Khan's
21 case continues. Mr. Reismeier may not even lose his job. As
22 you heard him testify yesterday, he has other roles,
23 responsibilities, he's the CA of other commissions. How can

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1 such a proposal be so drastic when the effects are so minimal?

2 But, on the other side, if Mr. Reismeier isn't
3 removed, the opposite is true for Mr. Khan. He has everything
4 to lose. Every action taken by the CA after this point will
5 be clouded in the veil of impropriety. The government wants
6 to analogize this proposal as the same as dismissal, but the
7 two remedies couldn't be further apart. Disqualifying the CA
8 isn't drastic, nor would it result in a, quote, unfair
9 windfall for Mr. Khan.

10 The prosecution assumes that the three-month
11 continuance in November was the appropriate remedy. This
12 assertion doesn't hold water. The delay was caused by the
13 failures of the prosecution. The continuance also benefited
14 the prosecution, giving them more time to investigate and
15 perfect their own arguments in defense of the convening
16 authority and why he should remain. A remedy that benefits
17 the prosecution can't be a just remedy for the defense,
18 especially not for the multiple and ongoing discovery
19 violations previously outlined.

20 On the other hand, the disqualification of the
21 convening authority is just, it's reasonable, and pragmatic.
22 And taken as either an independent basis or in the conjunction
23 with the previous three bases, Mr. Reismeier should be

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1 disqualified as the convening authority over Mr. Khan's case.

2 In conclusion, fair trials depend on equal opportunity
3 to evidence. Citing Stellato, quote, Full and timely
4 compliance with discovery obligations is the lifeblood of a
5 fair trial. Accordingly, parties to the courts-martial are
6 admonished to fulfill their discovery obligations with the
7 utmost diligence.

8 In citing this own commission, it is incumbent upon
9 the prosecution to execute this duty faithfully because the
10 consequences are dire if it fails to do so. Your Honor should
11 disqualify the CA as a just remedy given the prosecution's
12 continued and ongoing failures to provide responsive discovery
13 to the defense in a prompt manner.

14 Thank you, Your Honor.

15 MJ [COL WATKINS]: Thank you.

16 Government, do you wish to be heard?

17 ATC [Maj MITCHELL]: Yes, Your Honor.

18 Your Honor, good morning.

19 MJ [COL WATKINS]: Good morning.

20 ATC [Maj MITCHELL]: May it please the court and counsel.
21 "If asked to serve, I'll serve, but I'm not asking for the
22 job." You heard this from Mr. Reismeier yesterday. The
23 motion, Your Honor, asks this commission to disqualify a

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1 highly experienced and highly qualified retired military
2 officer, selected by the Secretary of Defense, from duty as a
3 convening authority on a standard that does not apply to
4 convening authorities.

5 The facts show that prior to becoming the convening
6 authority he interacted professionally with two prosecutors
7 from the Office of the Chief Prosecutor who were not detailed
8 to this commission; and after becoming the convening
9 authority, made a decision that did not meet the defense's
10 expectations when he approved 175 hours related to the
11 testimony of their current expert. Under the type-three
12 accuser, this is not enough to disqualify the convening
13 authority.

14 The defense also asks you to disqualify the convening
15 authority using standards that apply to military judges and
16 has never been applied to convening authorities. The defense
17 just now, in Mr. Moss' argument, asked you to use a
18 standard -- to use Mr. Reismeier's standard. Again, it's not
19 the standard that you have, Your Honor. You have the accuser
20 standard, and that's the standard that is required by the law.

21 So, Your Honor, this is -- the law that applies to
22 military judges is not the law. The accuser standard is.
23 This is described as a pillar of military jurisprudence. And

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1 under this law the convening authority is not disqualified.

2 The defense's motion should be denied for three
3 reasons:

4 First, the defense did not meet their burden of proof
5 for disqualification of the convening authority. But you need
6 to consider there's a set of cases that I'll ask you to
7 consider. That's the case law for the accuser standard,
8 Voorhees, Ashby, Nix, Jeter. The defense must show that the
9 convening authority is so closely connected to the offense
10 that a reasonable person would conclude that he had a personal
11 interest in the matter.

12 The defense must prove that he's so -- that he is
13 either so enmeshed in the offense or the accused that it would
14 create a situation where the convening authority must be
15 disqualified due to his personal feelings.

16 The facts from his memoranda and his testimony show
17 that he didn't have any knowledge of Majid Khan prior to
18 becoming the convening authority. He didn't know who Majid
19 Khan was until his appointment. He has no interest in the
20 accused, other than an official interest. There's also no
21 evidence that he has any disqualifying interest in any of the
22 offenses.

23 The defense spent a lot of time, a lot of ink in their

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1 motions, trying to prove that the convening authority had a
2 personal interest in Nashiri and the Bahlul commissions, and
3 he didn't need to. The convening authority -- the convening
4 authority recused himself from those cases.

5 So the fact that he interacted with prosecutors at --
6 at OCP, that he signed onto an amicus brief, are factors, are
7 good factors that led him to voluntarily recuse himself from
8 the Nashiri and the Bahlul commissions. These factors are
9 irrelevant to him being the convening authority for the Khan
10 commission. Applying the law, this court will find that a
11 reasonable person will take into consideration all relevant
12 circumstances as law.

13 So you need to take into consideration his military
14 commission work as part of the DPTF -- DPTF, no contact with
15 Khan prosecution, no contact with detainee prosecutions; his
16 work on the MCA, again, no contact with -- with the
17 prosecution. The work, he said, was not geared for a
18 conviction in any case. And frankly, from 2006 to 2009,
19 the -- the law was expanded with more rights for detainees and
20 his interactions with the prosecutions. These are -- these
21 are some of the things you have to take into consideration.

22 But also take into consideration that he has a 31-year
23 Navy career as an attorney, with an extensive career in

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1 military justice, to include a defense counsel, trial counsel,
2 trial and appellate judge.

3 A reasonable person would also note from his testimony
4 that Mr. Reismeier is someone who understands the function of
5 the convening authority and its duties, and, most importantly,
6 he understands his legal and ethical obligations to carry out
7 his post-trial duties in an impartial manner.

8 Considering all these circumstances, the defense fails
9 to overcome the presumption and fails to meet their burden.
10 Thus, they cannot succeed in disqualifying the convening
11 authority from this case. They cannot show that he had a
12 personal interest in the offense or the accused.

13 Secondly, the defense has yet to provide any evidence
14 that a convening authority has an inelastic attitude regarding
15 his post-trial duties under the standards set out in Davis.

16 The CAAF in Davis says, "It is a matter of right each
17 accused is entitled to an individualized, legally appropriate,
18 and careful review of his sentence by the convening authority.
19 The right is violated where a convening authority cannot or
20 will not approach post-trial responsibility with the requisite
21 impartiality."

22 The defense has not shown that the convening
23 authority, by any word or action, would not undertake his

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1 post-trial activities impartially. They want to claim that
2 since the convening authority authorized 175 hours instead of
3 the 200 is evidence that he has an inelastic attitude. This
4 action is not evidence of an inelastic attitude. It is
5 evidence of this convening authority making a thoughtful,
6 careful, and lawful decision.

7 Mr. Reismeier stated in his testimony that he did not
8 prohibit Mr. Kleinman from testifying in this commission as an
9 expert witness on a pretrial motion. He said on the stand "I
10 don't get to make that decision" because he's not the judge.
11 What he did was make a convening -- convening authority
12 decision of necessity.

13 The convening authority said if this judge were to
14 decide Article 13 applies -- and that's you, Your Honor --
15 then he as the convening authority would fund it. We submit
16 that when a person shows that he could follow the law, the
17 person does not have an inelastic attitude to this issue or
18 any other post-trial duty. Impartiality for Mr. Reismeier is
19 second nature to him.

20 Your Honor, discovery. Discovery is an ongoing
21 obligation that the prosecution continues to abide by. As the
22 prosecution, we make a determination on what is subject to
23 discovery. Since the 17th of July 2019, when the defense

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1 provided their first discovery request regarding the convening
2 authority, the prosecution has worked to meet its burden.

3 The defense asked us on 17 July 2019 to respond within
4 a week to their request. Documents going back to 2009, a week
5 to respond to their request. And we did. As we obtained
6 additional documents, after responding to this request, we
7 undertook further reviews of those documents, and we worked to
8 get those documents that we determined releasable to the
9 defense.

10 Now, those documents, we submit, that they had for
11 three months now -- they got them from November 19th. They
12 had the ability to examine the convening authority with the
13 full knowledge of the relevant documents. They had the
14 ability to investigate further, to file a supplement prior to
15 this hearing. And in addition to obtaining the documents,
16 this commission already granted a three-month continuance,
17 which in your order, Your Honor, you said was asked for by the
18 defense. The defense, as you've seen, was well prepared to
19 question and argue its motion.

20 Another point is that Majid -- that Mr. Reismeier did
21 not have knowledge of Mr. Majid Khan, none, prior to becoming
22 the convening authority. Evidence of our continuing
23 obligation you could well see. We found a document that was

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1 missing, and we gave it to them, and we gave it to them as
2 fast as we can. And that's Tab 46. We're taking it
3 seriously.

4 The fact remains, Your Honor, that the defense got
5 this information, and this commission ensured that had enough
6 time -- this commission ensured that they had enough time to
7 bring forth a motion and conduct argument.

8 Disqualification is not an appropriate remedy. The
9 appropriate remedy in 701 is the production of discovery or a
10 continuance, both of which have happened and removed any
11 potential prejudice.

12 I want to go back to, when you listen to Captain
13 Lyness: Where is the prejudice? Did you find any prejudice?
14 Did you talk about any prejudice? He had three months to
15 study, to look at these documents, to bring a motion.
16 Nothing. And they did, they looked at it. They brought their
17 motion. They brought the supplemental motion. There's no
18 prejudice.

19 There's no prejudice that requires an additional
20 remedy. An additional sanction that results in
21 disqualification of the convening authority is whole -- is
22 wholly inappropriate in this case.

23 And I want to -- I want to talk a little bit -- I just

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1 have a few more minutes. I want to talk a little bit about
2 the judicial standard that the defense is trying to apply.

3 The defense has conceded that the "appearance of"
4 standard is more often considered with respect to military
5 judges. That was in AE 040F at 11.

6 The defense also cited cases where the appellate court
7 suggests that the convening authority's function is judicial
8 in nature. The court doesn't -- the government doesn't
9 disagree that the convening authority has to undertake certain
10 judicial acts, but he's not a judge.

11 As persuasive authority, Judge Parrella in the
12 Mohammed, et al. case in AE 555EEE said as much. Judge Pohl,
13 also in the Mohammed litigation, concluded that the convening
14 authority is not a judge and he said the functions of the
15 convening authority do not encroach upon the distinctive roles
16 of the prosecutor, the military judge, or panel members. And
17 that's AE 091D at 3.

18 Merely because the convening authority in this
19 commission will undertake a judicial act, for example, the
20 approval of the sentence, such an act does not replace the
21 well-established accuser standard. It's a judicial standard
22 when it comes to disqualification of the convening authority.

23 In United States v. Dinges, the court concluded that

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1 it has consistently applied the accuser standard and Congress
2 has not chosen to legislate a different, more stringent test.
3 The government maintains that the appearance of partiality
4 standard is specifically for the disqualification of military
5 judges and not for the disqualification of the convening
6 authority, and the defense offers no authority clearly showing
7 otherwise.

8 The defense, Your Honor, spent a better part of three
9 hours trying to find some little nugget that will help them
10 prove that Rear Admiral Reismeier is an accuser in this case,
11 and they found none. It is more apparent than ever that the
12 law requires this court to deny the defense's motion.

13 Mr. Moss brought up that his drafting of the MCA is
14 somewhat related to his inelasticity. He said he couldn't be
15 a judge. He studied judicial canons. He said he couldn't be
16 a judge. That's wasting more time on the judicial standard.

17 I asked him, "Would it bruise your ego if the USCMCR
18 said one of these provisions that you worked on was unlawful?"
19 He said, "I have no personal interest in the way" -- I quote,
20 sorry -- "I have no personal interest in the way any of these
21 provisions are interpreted. Whether any of them survive
22 appellate review, I have no personal interest at all. There's
23 nothing in that act that reflects my personal view. That was

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1 my job as a -- my professional job as a staff attorney."

2 Your Honor, I want to push back on the conspiracy
3 argument. The conspiracy charge is well settled. The
4 D.C. Circuit in the en banc opinion rules that conspiracy is a
5 valid law of war argument -- law of war offense.
6 Additionally, Mr. Khan pled guilty voluntarily, on the advice
7 of his counsel, to conspiracy.

8 Again, if conspiracy goes up, a different case, the
9 Supreme Court may -- could say no, conspiracy is not a valid
10 law of war offense. Mr. Reismeier will follow the law. And
11 Mr. Majid Khan's case goes up for final action if there is not
12 a conspiracy, he said you will follow the law. That's not an
13 inelastic attitude.

14 Again, they brought up the sub-working group. They
15 didn't deal with individual cases. He said he didn't know
16 Majid Khan. While at the DPTF, you've got to understand on
17 the -- the 2009-2010 time frame, the MCA was written, so they
18 focused on policy decisions. Again, that's -- that's
19 extrinsic evidence that he doesn't -- he's -- he wasn't
20 dealing with these cases when he was co-chair of the DPTF.

21 And I brought -- I'm glad you brought up context. You
22 know, context is -- is a death knell to some of these quotes
23 that they're bringing up, the -- on the same side. When

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1 you -- when you look at that e-mail, when he was talking we're
2 all on the same side, this was 2009. He was part of Code 20
3 in the Department of the Navy, talking to another Navy JAG.
4 He was part -- he was -- he was part of the -- he was part of
5 the government. And that doesn't mean he was -- he's always
6 on their side.

7 When you look at the contents of -- of the e-mail,
8 Your Honor, you'll see on all these -- all these quotes that
9 they're bringing up, the context will make it clear. Even
10 back then, that doesn't show that he has a personal interest
11 in Majid Khan. He doesn't have a personal interest in these
12 offenses, and none of it shows that he has an inelastic
13 attitude to his post-trial duties; not one e-mail.

14 Your Honor, the motion must be denied because the case
15 law says that only a convening authority with a personal
16 interest in a case can be disqualified. This convening
17 authority did not advise, interact, counsel, nor assist a
18 single party that is assigned to this case.

19 The case law does not support disqualification of a
20 convening authority if that person, prior to be -- being the
21 convening authority, assisted in two -- assisted two other
22 prosecutors in two other commissions.

23 The defense has not shown that the convening authority

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1 can't effectively, impartially undertake his post-trial duties
2 in this case. So, Your Honor, we submit that the facts and
3 the law do not support the convening authority's
4 disqualification and the defense has not met their burden.

5 I have one more, one more thing. Going back to the
6 Article 13 and Mr. Kleinman's -- he says to an answer, "If the
7 judge were to say to me right now I order the production of
8 this person for purposes of Article 13 motion, my response
9 would be, 'My apologies, Your Honor. I didn't understand
10 that. I, of course, will approve it.'" His 25 extra hours.

11 A highly qualified convening authority, without any
12 disqualifying conflict in this case, selflessly answered the
13 call to serve. He is serving. And his testimony yesterday
14 demonstrated conclusively that he can continue to do so in
15 this case without fear or favor towards either side.

16 Thank you, Your Honor.

17 MJ [COL WATKINS]: I have a question.

18 ATC [Maj MITCHELL]: Yes, sir.

19 MJ [COL WATKINS]: Primary arguments about
20 disqualification of the convening authority are well argued
21 and well pled, and I understand them.

22 The concern I have is the inference that the
23 government has not completely executed their discovery

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1 obligations. For instance, it concerns me when a witness
2 says, "I was given no search parameters by the prosecution to
3 try to figure out what responsive material was." No
4 instructions.

5 It concerns me that there's a United States Navy
6 e-mail account there -- out there, that may contain material
7 that's responsive. And it's not my job to tell you how to
8 make sausage, but I have no indication that you even looked at
9 that, or at those agency records that were specifically
10 requested by defense.

11 Again, I'm not going to tell you how to make sausage.
12 But I'm asking you right now, as an officer of the court, has
13 the prosecution in this case diligently searched every area
14 suggested by the defense where these responsive materials
15 might be?

16 ATC [Maj MITCHELL]: Your Honor, I would say ----

17 MJ [COL WATKINS]: Because when you say ----

18 ATC [Maj MITCHELL]: I'm sorry.

19 MJ [COL WATKINS]: ---- discovery is ongoing, it's not
20 ongoing forever. We're going to get to a trial date or a
21 sentencing date. Your obligations are current as well as
22 ongoing.

23 Have you completed your search of everything suggested

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1 by the defense, or appropriately responded to them that you're
2 not going to? Which would be an invitation for a motion to
3 compel or reconsideration of a motion to compel.

4 ATC [Maj MITCHELL]: Okay. So, Your Honor, there are two
5 requests, two discovery requests we're talking about. One was
6 the July 25th -- sorry, July 17th request, and then there is
7 the request for the documents that were released from 9/11.
8 It is a -- there's two requests.

9 So the 9/11 request is completed. We agree that all
10 those were relayed, were produced to the -- to the defense.

11 When you look at the July 25th, 2009 -- 2019 request,
12 we -- the way I -- my understanding or my interpretation of
13 the discovery rules, you have to look for the places where
14 more than likely you will find responsive documents.

15 MJ [COL WATKINS]: Like Navy e-mail accounts.

16 ATC [Maj MITCHELL]: Navy e-mail accounts. But it has to
17 do with -- it has to do with this case, Your Honor. It has to
18 do with Majid Khan.

19 MJ [COL WATKINS]: Are you ----

20 ATC [Maj MITCHELL]: The ----

21 MJ [COL WATKINS]: Are you telling me, as an officer of
22 the court, that you've searched government records in places
23 specifically requested by the defense for responsive material?

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1 For instance, when they say the subject of the e-mail
2 was Article 13, and you did not think that was responsive to
3 their request, that's kind of stunning.

4 ATC [Maj MITCHELL]: I understand that, Your Honor, and
5 that -- and that was an interpretation that I made because
6 in -- in the e-mail ----

7 MJ [COL WATKINS]: Well, see, that's concerning.

8 ATC [Maj MITCHELL]: I -- but in the e-mail, when you look
9 at the -- when you look at the e-mail, he didn't --
10 Mr. Reismeier didn't say anything about Article 13.

11 The question was: Do you have this person's telephone
12 number? Or e-mail address, I'm sorry. And it had "Article
13 13" in the subject line. Mr. Reismeier responded with this is
14 his e-mail address, and there was nothing else. Nothing else
15 from Mr. Reismeier.

16 MJ [COL WATKINS]: All right.

17 ATC [Maj MITCHELL]: So that's ----

18 MJ [COL WATKINS]: So you're not understanding materiality
19 for the defense. As a former defense counsel, I can put that
20 subject line in a request for contact information and maybe
21 come up with something that helps my case.

22 ATC [Maj MITCHELL]: I understand, Judge.

23 MJ [COL WATKINS]: I'm not talking about admissibility in

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1 court or anything like that. This is anything that helps the
2 defense make trial decisions, informs their tactics, helps
3 them prepare for trial.

4 So I'm going to ask you for the third time: As an
5 officer of the court, have you searched everywhere that -- in
6 government files that might have responsive information? For
7 instance, those working group records, do you know if they do
8 not exist?

9 ATC [Maj MITCHELL]: No, Your Honor.

10 MJ [COL WATKINS]: You don't know that?

11 ATC [Maj MITCHELL]: No, I don't know that.

12 MJ [COL WATKINS]: Because you haven't gone out and asked
13 the appropriate people.

14 ATC [Maj MITCHELL]: Not -- no, Your Honor, because we --
15 we tied it to -- we tied it to the lens of the accuser
16 standard. That's what we tied it to. So when he said that he
17 had no contact with this case during that time, we tied it
18 specifically to that standard.

19 So I guess your answer is, if you're talking about
20 sub-working groups, DT -- no, sir.

21 MJ [COL WATKINS]: Defense, I can regulate discovery; I'm
22 not in a position to do so. All I can do is invite you to
23 move for appropriate relief and provide me the material that I

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1 would need that I can step in as a judge to regulate
2 government discovery. That's all I can tell you at this
3 point.

4 The prosecution lens is very often too narrow to meet
5 701 obligations, and it sounds like your lens is too narrow.
6 Your interpretation of what the defense needs is very often
7 too limited in scope to meet the spirit of 701.

8 ATC [Maj MITCHELL]: Yes, sir.

9 MJ [COL WATKINS]: Defense, do you have any rebuttal
10 argument?

11 DDC [CPT LYNESS]: No, Your Honor.

12 MJ [COL WATKINS]: All right. I'm going to deliberate on
13 the evidence and argument, and I'll issue a ruling as soon as
14 possible.

15 As I stated yesterday, I only received Appellate
16 Exhibit 045, an ex parte filing by the government, this last
17 Friday. I'm still reviewing that pleading.

18 It may be premature, but, Defense, do you have any
19 comments on AE 045 for the record?

20 CDC [MR. DIXON]: Your Honor, we object to AE 045. We can
21 address those now or in the future as may be necessary.

22 MJ [COL WATKINS]: Well, you -- it was filed ex parte. I
23 assume you don't know the subject matter, correct?

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1 CDC [MR. DIXON]: We do not ----

2 MJ [COL WATKINS]: So this ----

3 CDC [MR. DIXON]: ---- but we do have some general
4 objections.

5 MJ [COL WATKINS]: State your general objections.

6 CDC [MR. DIXON]: May I have a moment, Your Honor?

7 MJ [COL WATKINS]: Yes.

8 **[Counsel conferred.]**

9 CDC [MR. DIXON]: May I proceed?

10 MJ [COL WATKINS]: Please.

11 CDC [MR. DIXON]: Your Honor, we found out about the
12 existence of AE 045 from a filings inventory that we received
13 on Friday afternoon, and we asked the prosecution what nature
14 of the filing concerned, and the prosecution thus far has
15 refused to provide us with any information.

16 That's important, because we don't know whether AE 045
17 is a motion. We don't know whether it relates to discovery in
18 this case. I mentioned discovery because the notice itself
19 references discovery provisions in the MCA and in the
20 evidentiary rules.

21 We also don't know specifically whether it relates to
22 the disqualification issues that are pending before Your
23 Honor. Nor do we know if the issue relates, as in the 9/11

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1 case, to a motion by the government to allow unknown
2 government officials to have real-time access to this
3 courtroom so that the government can instruct Your Honor to
4 shut down the proceedings if the government hears something or
5 we say something that they don't like.

6 If that is the issue -- and again, we don't know, but
7 if that is the issue, we don't know whether such real-time
8 access has been ongoing in connection with this case. If it
9 has, we don't know whether Your Honor might have been aware of
10 that issue previously.

11 And in light of what we don't know, we object on
12 several grounds:

13 First, we object generally to the ex parte submission.

14 We object to the lack of timely notice and opportunity
15 to respond to the submission; that is, in and of itself, a due
16 process violation, a procedural due process violation.

17 We object to the lack of information about the nature
18 of the submission. We don't understand why the government
19 couldn't say this filing relates to discovery or this filing
20 relates to another issue.

21 And again, if the issue does concern courtroom
22 monitoring, we object specifically in light of the fact the
23 issue was discussed in open court in the 9/11 case.

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1 And I'm compelled to argue that simply filing an
2 ex parte submission without any notice or any context would
3 not be -- it would not be allowed in federal court; I can tell
4 you that. And it raises a question of why the government
5 would attempt to do something like that here in a military
6 commission. And I respectfully submit that the inference that
7 we as the defense draw from that is because the government
8 thinks it can get away with it. The question is whether Your
9 Honor will allow it.

10 And again, I have to emphasize that I'm -- I'm arguing
11 from an assumption about what the subject matter might be.
12 But with respect to these objections, I think they apply
13 generally.

14 I respectfully submit that if this is an issue of
15 courtroom monitoring, that Your Honor should not allow it. To
16 allow the government to file ex parte in this manner on an
17 issue like this would affect a partial courtroom closure,
18 right?

19 I mean, access to -- public access and access by the
20 defense to the courtroom includes access to court filings, to
21 judicial records, including documents like AE 045. And to
22 effect a courtroom closer, even a partial closure, the
23 government must establish a compelling interest that is

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1 narrowly tailored, where no alternate remedies exist.

2 And that, I submit, Your Honor, could not be the case
3 here if the issue involved the monitoring for the very simple
4 reason that Judge Cohen in the 9/11 case had open discussion
5 among the parties about that very subject. That was about a
6 week ago.

7 I also invite Your Honor's attention to the general
8 importance of public trials and the full adversarial process,
9 particularly where someone's liberty is at stake. It's
10 important because public access, and certainly an access by
11 the defense, affects outcomes. It makes a substantive
12 difference.

13 I also invite Your Honor's attention to the last time
14 the government made an ex parte filing in this case without
15 notice to the defense, at least the last time that we are
16 aware of. That was in connection with AE 030, the motion to
17 compel production of witnesses.

18 And in response to that ex parte filing, Your Honor
19 issued AE 030E on the motion to compel, which led to nearly a
20 year of legal briefing including briefing on questions
21 concerning the location of AE 030, which Your Honor has
22 addressed previously in this session of -- of the commission.

23 Your Honor, we object as well to any real-time

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1 monitoring of these proceedings, if that is, in fact, what the
2 issue is. We object to monitoring of proceedings by unknown
3 government officials. We can only assume, but do not know,
4 that that would include the Central Intelligence Agency. We
5 would object to unknown government officials dialling into
6 these proceedings for the purposes of telling this court when
7 it's necessary, in the government's view, to shut down the
8 proceedings.

9 The implication of having an unknown government
10 official look over Your Honor's shoulder is threefold. The
11 implication is, first, that the defense and Mr. Khan can't be
12 trusted to act properly.

13 Second, the implication is that the prosecutors in
14 this case can't be trusted to object when they feel -- when
15 they deem it appropriate.

16 And the third implication is that Your Honor can't be
17 trusted to control the courtroom. The government plainly
18 thinks, if this is a monitoring issue, that they need to have
19 real-time access to the court to tell Your Honor what they
20 think ought to happen.

21 Your Honor, of course, is the decision-maker in that
22 regard. They clearly feel the need to tell you what to do.
23 And that, in and of itself, undermines the fairness and

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1 integrity of the proceedings.

2 It is also not lost on Mr. Khan and the defense that
3 we're here this week to address conflicts of interest. And if
4 Your Honor feels the need to have someone monitor these
5 proceedings, if that is, in fact, the issue and Your Honor is
6 inclined to do that, I respectfully submit, Your Honor, that
7 you should require those individuals to be here in court with
8 the rest of us.

9 Your Honor should order disclosure of the ex parte
10 filing. Let's see who is behind the curtain here. The
11 D.C. Circuit held in the Nashiri case that criminal justice is
12 a shared responsibility. Some government agency thinks it
13 needs to monitor these proceedings, Your Honor should order
14 them to come here and to be in court with the rest of us.

15 Thank you.

16 MJ [COL WATKINS]: Thank you.

17 All right. Are there any other matters from either
18 side before I recess?

19 TC [CDR O'DOWD]: Sir, if I might, just to respond to ----

20 MJ [COL WATKINS]: All right.

21 TC [CDR O'DOWD]: ---- Mr. Dixon.

22 The government believes AE 045, ex parte motion was --
23 filing was filed in accordance with the applicable rules. And

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1 as far as notification, the government sent an unclass
2 notification to the defense the same day it filed the ex parte
3 filing, sir.

4 MJ [COL WATKINS]: Okay. Anything else from the
5 government?

6 TC [CDR O'DOWD]: No, sir.

7 MJ [COL WATKINS]: Anything else from defense?

8 CDC [MR. DIXON]: No, Your Honor.

9 MJ [COL WATKINS]: Thank you, all. This commission is in
10 recess.

11 [The R.M.C. 803 session recessed at 1147, 26 February 2020.]

12 [END OF PAGE]

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